

NEPA Modernization (CE),
Associate Director for NEPA Oversight
Attn: Horst Greczmiel
722 Jackson Place NW.
Washington DC 20503

December 15, 2006

Re: Comments on the Use of Categorical Exceptions and the Developoment of Fluid Minerals

Dear Sirs:

ALL Consulting is pleased to review and comment on the new Guidance on categorical exclusions (CX) published by the White House Council on Environmental Quality (CEQ). The CX can be a useful tool for NEPA compliance but it is important that the CX be clearly distinguished from the Environmental Assessment (EA). We have tried to emphasize this aspect in the following comments.

Introduction

The definitions in 40 CFR § 1508.4 and the proposed guidance, *Establishing, Revising, and Using Categorical Exclusions under the National Environmental Policy Act*, define a document (the CX) intended to be much less onerous than the EA or EIS. But there are real questions of how the CX vehicle could serve Fluid Mineral development on Federal Lands. There are several lists of possible CXs that might be relevant to the development of Fluid Minerals. Some of these examples are included below:

Department of Interior (DOI) Handbook 516 DM, Chapter 11.5, B contains this list of CX's that might apply to BLM managed lands:

- (1) *Issuance of future interest leases under the Mineral Leasing Act of Acquired Lands where the subject lands are already in production.*
- (2) *Approval of mineral lease adjustments and transfers, including assignments and subleases.*
- (3) *Approval of minor modifications or minor variances from activities described in approved development/production plans (e.g., the approved plan identifies no new surface disturbance outside the area already identified to be disturbed).*
- (4) *Approval of unitization agreements, communitization agreements, drainage agreements, underground gas storage agreements, compensatory royalty agreements, or development contracts.*
- (5) *Approval of suspensions of operations, force majeure suspensions, and suspensions of operations and production.*
- (6) *Approval of royalty determinations such as royalty rate reductions.*

Analysis by the BLM (BLM, 2006) of Geophysical operations of managed lands led to the following required NEPA documents and resulting impacts:

Table 2: Type of NEPA Actions Used for Geophysical Exploration Authorizations

NEPA Type	Frequency from 10/1/00 through 09/30/05	Percent (%)	Number of Actions Resulting in Significant Impacts
EA	218	90	0
EIS	18	7	0
CX	8	3	0
Total	244	100	

Lastly the 6/9/06 Montana BLM Instruction Memorandum (IM) No. MT-2006-063 - Template for Documenting Categorical Exclusions (CX) Based on Section 390 of the Energy Policy Act of 2005 lists the following suggested categories of appropriate CXs:

1. Individual surface disturbances of less than five (5) acres so long as the total surface disturbance on the lease is not greater than 150 acres and site-specific analysis in a document prepared pursuant to NEPA has been previously completed.
2. Drilling an oil and gas location or well pad at a site at which drilling has occurred within five (5) years prior to the date of spudding the well.
3. Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed drilling as a reasonably foreseeable activity, so long as such plan or document was approved within five (5) years prior to the date of spudding the well.
4. Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within five (5) years prior to the date of placement of the pipeline.
5. Maintenance of minor activity, other than any construction or major renovation of a building or facility.

The examples from the Department of Interior Handbook 516 DM Chapter 11, the Montana BLM Instructional Memorandum, and the research report (BLM, 2006) cited above paint a discouraging portrait of a NEPA vehicle (CX). CXs appear to be used only for the most trivial activities as part of a massive process (NEPA) gone seriously off-course that is generating mountains of paperwork in order to regulate activities (for example, seismic and gravity exploration) with no significant impacts. Those 218 EAs and 18 EISs (BLM, 2006) in the past five years might well represent a million hours of pointless, unfocussed effort having to do with important activity that customarily treads lightly on the land. In order for this particular NEPA Modernization effort to have a profound impact, the CX vehicle must be made simple to implement and must be applicable to industry-standard development activities that may have significant environmental impacts under some conditions.

The examples of appropriate applications for the CX as listed by the DOI Handbook 516 DM and the Montana BLM IM are truly trivial; these activities should only require notice to the

agency and compliance with relevant rules and regulations. The mere consideration by a Federal agency that an EA might be required to transfer an oil and gas lease from one approved and bonded operator to another approved and bonded operator (as per 516 DM, Ch 11.5,B,2) is ludicrous. The question that needs answering is whether an operator who wishes to add five new wells to a 100-well project needs an EA. If we have before us handbooks and guidances addressing trivialities, the answer appears to be Yes! It's development activities of this magnitude that need to be addressable by the CX in order for the vehicle to be meaningful.

Comments:

The stated purpose of the CX is to reduce unnecessary analyses and paperwork in the NEPA process, however, the Draft CX Guidance issued for public comment on September 16, 2006 describes a device that does not appear to be a procedural improvement over an EA and is so vaguely defined that it almost lacks meaning. Five vitally important aspects of the Draft Guidance and the CX vehicle are commented upon in the following:

- 1) Lack of specificity within the Draft Guidance as to the definition of important parts of the CX.
- 2) Lack of clear direction in the preparation of the CXs.
- 3) Potential for important inequities in CX implementation among federal field offices.
- 4) Fixation with avoiding challenges.
- 5) Deficiencies with the CX tool itself.

Lack of Specific Definitions

A number of important terms have NEPA-specific definitions; these are inadequately defined for reliable preparation of CX applications.

Significant: Several terms are important to the magnitude concept of the CX but too often the Guidance contains instances of undefined adjectives such as relatively routine, significant, insignificant, and considerable. For example, there are 12 separate uses of the word "significant" in the new Guidance and the term is one of the few described in NEPA regulations (CFR 1508.27) and yet in the regulations or in the Guidance there are no gauges to judge whether a proposed project might have a "significant" effect or not. Among the most important indicators of CX significance is the phrase "a significant effect on the human environment." What precisely does this mean? When judging a potential impact, how many disturbed acres are significant? How much haze constitutes a significant effect? Some managers and a majority of the public consider any effect at all on the environment to be a trigger for an EA or EIS. This impression must be clearly and forcefully refuted by the Guidance.

The Guidance must make it clear that significant is not a synonym of measurable, detectable, or *de minimis*. Impacts to the environment can be thought of as extending from non-detectable to detectable (*de minimis*) to insignificant to significant (*de manifestis*). The span of effects from detectable to significant will depend upon the environmental aspect but can be wide. Significant effects might best be thought of as synonymous with *de manifestis* (requiring mandatory action) effects. The new Guidance could be of maximum usefulness if it expounded

on the meaning of significant as it pertains to environmental impacts and as it applies to federal agencies and the general public.

The explanatory section within the NEPA regulations includes the following sentence [CFR 1508.27.(b)(6)] as an example of factors that need to be considered when determining significance: *"The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration."* This sentence appears to say that anything "new" is significant; clearly this violates the stated purpose of the CX vehicle. This sentence and others within the regulations and the Guidance must be modified to clarify that only serious impacts on the environment require NEPA action.

Controversial: The regulations contain this sentence [CFR 1508.27.(b)(4)] that needs to be considered when judging the significance of an action: *"The degree to which the effects on the quality of the human environment are likely to be highly controversial."* What is the quantitative definition of "controversial" and "highly controversial"? Clearly this requires a measure of the level of feelings both within the general public and within the technical community concerning the proposed action. But the regulations and Guidance are silent about how to measure controversy. If the relevant agency has received a single piece of public comment on an environmental issue, does that constitute controversial? How many comments must be received and over what time period? If the public comments were all identically worded, suggesting a mass-mailing from an NGO, does this count as bona fide controversy? Do verbal concerns expressed at public hearings count toward the measure of controversy?

Will there be an evaluation of the scientific merit of the comments received or can baseless comments tip the scales if there are enough of them? This last question is at the heart of the determination of controversy and significance; scientific merit is important to NEPA documentation and analysis and it must also be an important aspect of the evaluation of public controversy. Questions of scientific merit should be addressed by the CX applicant and by the managing agency.

Extraordinary Circumstances: Another important aspect of the CX process is the concept of the extraordinary circumstance that is meant to limit the relevance of the CX. What exactly is an "extraordinary circumstance"? There are ten paragraphs in the Guidance that specifically refer to extraordinary circumstances. The Guidance recommends that each agency maintain a list of extraordinary circumstances, suggesting that there will be several of these. Obviously if there are a large number of circumstances such as for certain nesting dates and certain nesting areas, then crafting a successful CX that fits in between extraordinary circumstances may prove impossible. Lists of automatic extraordinary circumstances violate the spirit of CXs in that the extraordinary circumstances prevent the consideration of possible exclusions under those circumstances.

Those listed automatic extraordinary circumstances could be extremely wide-ranging and powerful, for example, might not the presence of a species listed as endangered be an "extraordinary circumstance" powerful enough to trump any prospective CX? Does the presence of a wetland or Riparian Zone prevent the use of CX? Declaring absolute extraordinary circumstances can give agencies an easy exit to avoid analytical decisions and should be discouraged. If there is a list of automatic extraordinary circumstances, there also should be a list of automatic triggers that approve CXs – any repairs to wells, roads, pipelines, buildings at an existing development should be automatic. Likewise any replacement wells or

facilities and additional wells up to the number specified in the EA should also be granted an automatic CX.

Directions for Preparation:

CX should be proposed on the grounds of analyses, scientific documentation, and reconciliation of public comment.

Documentation: CXs need documentation and analysis as to local conditions and proposed actions; the Draft Guidance refers specifically to Scientific Analyses and Benchmarking information. The Guidance notes that the applicant and agency need not be restricted to data published in peer-reviewed literature but this leads to the question of what kinds of data need to be analyzed in a CX? Must new data be gathered since the granting of the enabling NEPA planning documents, either EIS or EA or can the applicant use documentation and analyses from those documents? Must the applicant analyze the managing agency's monitoring data? Must the applicant supply internal, site-specific data? Must the applicant consider outsider data, regardless of any quality? The Guidance states that the *federal agency remains responsible for determining whether the information in question reflects accepted knowledge or findings and addresses the effects of the actions included in the proposed categorical exclusion* and presumably this refers to the issuing agency. There are no directions on how the agency determines scientific quality and relevance. Is this to be an open process, subject to outside comment and challenge?

Can the supporting documentation consist of the re-analysis of data from existing EISs and EAs? Clearly if the CX requires the same amount of site-specific documentation and analysis as required by an EA, then the CX is a redundant NEPA vehicle that does not have a purpose. The intent of the CX is to be a simple document meant to extend an existing EA or EIS to include a new action and if the requirements are not simple, then the CX tool itself is not needed.

Public Comment: The Guidance notes that publication in the *Federal Register* is currently required. Is this requirement necessary for a CX? Can the public comment received during relevant EIS and EA preparation suffice for the CX? If the CX being proposed pertains only to a specific geographical area, can local (county and state) publication be sufficient? A case can be made that local publication has more thorough coverage for the local population than does the *Federal Register*, one that would be more likely to be seen and read by local citizens. Furthermore, the publication of local notices is more timely and scale-appropriate to CX documents.

Potential for Increasing Inequities Between Field Offices

The Draft Guidance does not address the issue of the tendency for inequities to develop between agencies and between field offices within the same agency. The lack of consistency between field offices has been a big problem for a long time – not only application process time but material differences can happen between field offices in the same region. If the CX vehicle is not well defined in the Draft Guidance, its use and mis-use can lead to variations and injustices between permitting offices.

Periodic Review of CXs: The Draft Guidance calls upon the federal agencies to review CX policies and experience with the vehicle. Suggested techniques include collection of CX information from the field offices along with public comment. It is this information, gathered on a regular basis that would be the process by which consistency could be guaranteed. For

example, if the BLM were to compile those CXs that refer to Fluid Minerals in all of its field offices, headquarters staff will see the range of CX applications and will understand how much documentation is required in the offices. It would then be the job of headquarters to compile standards that would apply to Fluid Minerals development.

The Draft Guidance suggests that review might take the form of a collection of CXs or it might be part of a much broader program review examining many management tools besides CXs. The Draft Guidance suggests agencies do a program review of all of their CXs or review all of their decisions in a single program. This is a huge task to be done by an over-worked agency and yet the information needs to be captured in a process meant to avoid imbalance with the way CX are managed across several field offices. It is perhaps more realistic to suggest that the reviews might better be accomplished by a third party – an uninvolved federal agency such as the Department of Energy or a private contractor. In this way the process will get a thorough look and a fresh look from the NEPA-users point of view rather than the NEPA enforcer.

Avoiding Legal Challenges

Throughout the Draft Guidance, there is an emphasis on the need to avoid opportunities for legal challenges. This concern appears to be misplaced. Any decision taken by an agency under NEPA is open to legal challenges. Intricate precautions that demand exhaustive documentation will still afford opportunities for repeated challenges. What needs to be adopted is a policy of rigorously defending NEPA decisions from meritless challenges. If outsiders (whether developers or NGOs) are unsuccessful in their challenges, these will go away. It's clear that NEPA documents will never be "bullet-proof" and it's clear that judges cannot be changed; it must become obvious to all players that the BLM or USFS will doggedly defend the decisions of their staff. Until such a time, legal challenges will be a way of life that will retard Fluid Mineral development on federal lands.

Deficiencies in the CX Tool:

The CX vehicle has a legitimate place within the NEPA universe as a way to obtain an expeditious decision for a proposed action that is similar to previously approved actions and is not expected to lead to environmental impact. The CX has several weaknesses that limit its usefulness and the new Guidance should address weakness in the CX vehicle as it exists.

Documentation: Level of documentation for a CX is not well defined in the regulations or in the new Guidance. As an example, suppose a thirty-well oil and gas development was approved in an EIS two years ago and now the operator wants to re-drill ten of the wells as horizontal laterals. As long as the thirty wells were drilled within the environmental planning parameters laid out in the EIS, subsurface changes to those wells could be done within the same forecast parameters. What degree of documentation is needed for the CX? Is new documentation required in addition to that supplied with the EIS? A simplified CX application might consist of a summary of the planned activity, expected impacts, and planned mitigation. If, however, new site-specific environmental data and new impact analyses are needed, then the CX is no different than an EA.

The aspect of documentation is part of the issue of differentiating CXs from EAs in terms of their relative difficulty and expense. The Guidance must be especially careful to maintain the advantage in time, effort, and expense for the simpler CX application. If the Guidance requests

that more documentation be done and more thorough analysis of potential impacts, there is then no advantage in having the CX vehicle.

Protection from Judicial Invalidation: Judicial challenges are a fact of life for EISs and EAs and the attendant delays are built into the process. But CX approval is meant to be an expedited process; court challenges must be discouraged and the vehicle protected by the Guidance process. The new Guidance should set forth a framework that will be robust enough to withstand and discourage court challenges. The Guidance must emphasize the technical aspects of the process and the need for the managing agency to maintain credible technical expertise that can bolster any decision to adopt the CX. Guidance should emphasize the need for a formal review of impacts from developments as they are constructed and periodic review of monitoring data, with the goal being to develop technical expertise within the managing agency. The technical expertise itself can become a defense of the decision without relying on specific monitoring data and analysis. As an additional defense against challenge, the decision to adopt the CX must tier off the original development rationale contained in the EIS or EA and be based on environmental documentation contained in these planning documents. Quotation of the development rationale from the planning document as well as defensible technical expertise can insulate the CX from judicial challenges.

References:

Subject: Analysis Report on the results of a Bureau of Land Management data call for information on NEPA records for geophysical exploration of oil, gas, or geothermal energy.

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Respectfully,
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